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In the Supreme Court of the United States

OCTOBER TERM, 1982

JAMES A. MURRAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the decision below dismissing his suit against the United States on the ground that there is no statutory provision according jurisdiction to entertain such a suit.

The pertinent facts may be summarized as follows: On December 20, 1978, petitioner recorded in Cass County, North Dakota, a mortgage on certain real property owned by a delinquent taxpayer, Fireside, Inc. (Pet. App. A-2). The property was then subject to a prior mortgage, federal tax liens and several judgment liens (*ibid.*). On April 18, 1979, the Internal Revenue Service seized the property for nonpayment of taxes (Pet. App. A-2). The property was thereafter declared to have been purchased by the United States at a tax auction for $301.84, the minimum bid pursuant to Section 6335(e)(1) of the Internal Revenue Code of

1954 (26 U.S.C.) (Pet. App. A-2 to A-3). Petitioner did not bid at the sale and did not contest the validity of the tax liens or the regularity of the auction sale (Pet. App. A-3). As a purported holder of a junior mortgage, however, he attempted to redeem the property pursuant to Section 6337(b) of the 1954 Code by submitting $320, the amount necessary for redemption, to the Internal Revenue Service (Pet. App. A-3). The Internal Revenue Service returned petitioner's remittance, taking the position that his purported mortgage on the property was not valid (*ibid.*).[1]

Thereafter, on February 1, 1980, the United States sold its interest in the property to the first mortgagee, Casselton State Bank. Eight months later, petitioner brought this suit in the United States District Court for the District of North Dakota, seeking damages of $70,000 for the alleged wrongful refusal to accept his redemption offer or, alternatively, a writ of mandamus compelling the United States to convey the real property to him and to void all prior deeds it had given on the property. The district court dismissed the suit on the ground that the United States had not waived its sovereign immunity with respect to such claims (Pet. App. A-4).

The court of appeals affirmed (Pet. App. A-1 to A-13).[2] It held (1) that petitioner's claim for damages arose "in respect of the assessment or collection of [a] tax," and was therefore excluded, under 28 U.S.C. 2680(c), from the scope of the Federal Tort Claims Act (28 U.S.C. 1346(b)); (2) that various other jurisdictional provisions relied on by petitioner (28 U.S.C. 1331, 1340, 1356 and 1361) did not waive the

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[1]In making this determination, the Internal Revenue Service noted that the mortgage was given to petitioner as security for the personal debts of Fireside's principal shareholder and that the transaction had not been approved by Fireside's board of directors (Pet. App. A-3).

[2]The opinion of the court of appeals is reported at 686 F.2d 1320 (1982).

government's sovereign immunity; and (3) that petitioner's suit did not fall within the scope of 28 U.S.C. 2410 (providing for the maintenance of certain quiet title actions against the United States (Pet. App. A-4 to A-12).[3]

1. Abandoning any claim that this action is permitted under the quiet title provisions of 28 U.S.C. 2410,[4] petitioner now relies solely on the Federal Tort Claims Act and

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[3]The court of appeals noted that its affirmance of the district court's dismissal was without prejudice to any action petitioner might thereafter bring against parties other than the United States in an appropriate state court (Pet. App. A-13). It should be noted, however, that there is a typographical error in the court's opinion, citing the pertinent state statute as N.D. Cent. Code § 32-17-91 (repl. 1976), instead of N.D. Cent. Code § 32-17-01 (repl. 1976). That statute provides that "[a]n action may be maintained by any person having * * * [a] lien or encumbrance upon * * * real property * * * against any person claiming an estate or interest in, or lien or encumbrance upon, the same, for the purpose of determining such adverse estate, interest, lien, or encumbrance" (§ 32-17-01).

[4]The court of appeals based its decision as to 28 U.S.C. 2410 on the theory that petitioner could claim only a mortgage interest in the property and not title. See, e.g., *Samet* v. *United States*, 242 F. Supp. 214, 222-223 (M.D. N.C. 1964); *Russo* v. *United States*, 47 A.F.T.R.2d 434 (D. Ariz. 1980) (a redemption serves only to place all parties in their former status, thereby reviving any junior mortgage). The government, however, did not contend that the remedy provided by 28 U.S.C. 2410 was available only to persons claiming title and not to persons claiming security interests. At all events, it is clear that 28 U.S.C. 2410 applies, by its terms, only where the United States itself claims a "mortgage or other lien" against the property in question. Thus, it does not apply where, as here, a lien interest has been converted to title. See *Bank of Hemet* v. *United States*, 643 F.2d 661, 664 n.1 (9th Cir. 1981); *Trustees of the Puritan Church* v. *United States*, 294 F.2d 734 (D.C. Cir. 1961). As *Bank of Hemet* illustrates, the appropriate remedy in such circumstances is an action under 28 U.S.C. 2409a, which permits suits "to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." But such an action would itself be appropriate only so long as the government was continuing to claim such an interest in property, and could not be commenced after the government had conveyed title to a third party. See *Bank of Hemet* v. *United States*, *supra*, 643 F.2d at 665.

the mandamus provisions of 28 U.S.C. 1361, as providing the statutory bases for maintaining this action (Pet. 7-10). It is well settled, however, that the mandamus provisions of 28 U.S.C. 1361 do not themselves constitute or operate as a waiver of sovereign immunity. See, e.g., *Estate of Watson* v. *Blumenthal*, 586 F.2d 925, 934-935 (2d Cir. 1978); *Hill* v. *United States*, 571 F.2d 1098, 1101 n.5 (9th Cir. 1978); *Essex* v. *Vinal*, 499 F.2d 226, 231-232 (8th Cir. 1974), cert. denied, 419 U.S. 1107 (1975), and the cases cited therein. Thus, a suit for relief in the nature of mandamus could not properly be maintained, in any circumstances, against the United States itself.[5]

The courts below also correctly held that petitioner's claim for damages under the Federal Tort Claims Act was barred by 28 U.S.C. 2680(c), which provides that this remedy "shall not apply to * * * [a]ny claim arising in respect of the assessment or collection of any tax * * *." As the court of appeals noted, any right petitioner may have had to redeem the property under Section 6337(b)(1) arose only in connection with a tax levy, and was an integral part of such levy (Pet. App. A-6). Where, as here, property is deemed to have been purchased by the United States pursuant to Section 6335(e)(1), the ultimate objective of the government is not to own the property, but to sell the property so that the proceeds of sale can satisfy the outstanding tax liabilities. See Section 7506(d); S. Rep. No. 1708, 89th Cong., 2d Sess. 31 (1966). Accordingly, the

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[5]Even if an appropriate individual government officer had been named as a defendant, petitioner would still not be entitled to the requested relief because it would have been wholly beyond the power of any such officer to convey to petitioner any interest in the subject property, which had already been conveyed to a third party. At all events, petitioner would not be entitled to a deed to the property even if his redemption were effective (see note 4, *supra*). Thus, even apart from sovereign immunity, the requested mandamus relief would be inappropriate.

collection process remained incomplete in this case until the United States sold the property. In these circumstances, the court of appeals correctly held that Section 2680(c) bars petitioner's claim for damages.[6]

2. Petitioner also contends (Pet. 10-12) that even in the absence of any express statutory waiver of sovereign immunity, his cause of action against the United States is

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[6]Even if Section 2680(c) did not apply here, petitioner's suit would be barred by 28 U.S.C. 2680(a), which prohibits any tort claim against the United States that is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." By its terms, the redemption right provided by Section 6337(b) of the 1954 Code is conferred only on those persons "having" an interest in the subject property. Contrary to the petitioner's suggestion (Pet. 7 n.2) that the Internal Revenue Service must accept a tender offer in the correct amount from any person who *asserts* that he had such an interest, the statute implicitly requires that, in order to ascertain whether a proper redemption offer has been made, a determination must be made as to whether the asserted interest actually exists. The circumstances here (see note 1, *supra*) suggested that there was at least some question as to the validity of petitioner's asserted mortgage interest. Whether or not the determination made by the responsible officials that such a mortgage would not be recognized under state law was correct in this instance, the making of such a determination represents the kind of function that Congress intended to protect under 28 U.S.C. 2680(a). Cf. *American Association of Commodity Traders* v. *Department of the Treasury*, 598 F.2d 1233, 1235 (1st Cir. 1979).

Moreover, even apart from the effect of these statutory exceptions to the scope of the Federal Tort Claims Act, that Act permits damages to be sought from the government only to the extent that a private person "would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). Petitioner has cited no authority for the proposition that a private person who rejects a redemption offer would be subject to tort liability under North Dakota law. Moreover, his reliance (Pet. 8) on *Guthrie* v. *Curnutt*, 417 F.2d 764 (10th Cir. 1969), is misplaced. The court there did not allow the recovery of damages, but only provided an adjudication as to the effectiveness of a redemption offer.

supported by implication under the Due Process Clause of the Fifth Amendment. But claims in excess of $10,000 based on an alleged deprivation or taking of property contrary to the Fifth Amendment may be asserted in the United States Claims Court under the Tucker Act, 28 U.S.C. (Supp. V) 1491. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125-127 (1974). Accordingly, there is no reason for extending the scope of the district court's jurisdiction over such claims, which is limited to those claims that do not exceed $10,000. 28 U.S.C. 1346(a)(2).[7]

Moreover, there is no basis for petitioner's contention (Pet. 10-11) that he was deprived of property without due process. Insofar as that contention relates to the loss of his junior mortgage rights, as a result of the sale of the property to the United States (see Section 6339(c)), the requirements of due process are satisfied by the notice provisions of Section 6335(d) of the 1954 Code, which provide junior lienholders a fair opportunity to protect their interests by bidding at the tax sale. For whatever reasons he may have had, petitioner failed to avail himself of this opportunity to protect his asserted interest in the property here in question. Since the redemption right conferred by Section 6337(b) is exclusively a creature of federal statute, not itself required by the Due Process Clause or any other provision of the Constitution, there is no constitutional bar against any limitations Congress may choose to impose on the manner in which the right of redemption might be enforced. See *Davis* v. *Passman*, 442 U.S. 228, 241 (1979).

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[7] *Davis* v. *Passman supra*, upon which petitioner relies (Pet. 11), is distinguishable. At issue there was whether an individual could be sued on the basis of an "implied" cause of action under the Due Process Clause of the Fifth Amendment. The decision there does not deal with the entirely different question whether the United States could properly be named as a party to such a suit except as expressly authorized by statute.

At all events, there would have been no bar against petitioner's bringing an action against the United States for a determination of his rights pursuant to 28 U.S.C. 2409a, if such a suit had been instituted during the period between the refusal of the redemption offer and the ultimate sale of the property to Casselton State Bank (see note 4, *supra*). Even though it is now too late for petitioner to proceed in this regard, it is possible that he could seek redress against the ultimate purchaser of the property under North Dakota law on the theory that the redemption tender effectively revived his mortgage interest in the property. See note 3, *supra*.[8]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

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[8]Petitioner contends (Pet. 10 n.5) that Section 6339(c) would bar a suit against the ultimate purchaser. That provision, however, deals with the effect of a certificate of sale issued to the purchaser at the tax sale pursuant to Section 6335. It does not purport to govern the effect of a subsequent sale by the tax sale purchaser on the intervening rights arising on a redemption under Section 6337(b). It is, of course, possible that the North Dakota courts would nevertheless hold that the bank acquired title free and clear of any claims that might be based on redemption offers that were not accepted by the Internal Revenue Service. But it is difficult to understand how the bank could have acquired any better title than the government had. Thus, if petitioner could have successfully challenged the title held by the United States had he brought a timely action under 28 U.S.C. 2409a, it would seem that he could pursue the same remedy against the bank or its transferees in a quiet title proceeding under state law.